IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

Second Appeal No.313 of 1990

1. Abbas Babalkal Bidiwale
since deceased by his L.Rs.
1A Sahabuddin Abbas Bidiwale
1B Mohamed Yusuf abbas Bidiwale
1C Hamid Abbas Bidiwale
1D Amir Ilahi Abbas Bidiwale
1E Gulam Dashgir Abbas Bidiwale
1F Sabir Abbas Bidiwale ... Appellants
1G Manohar Abbas Bidwale (Orig.Defendants)

V/s

Shri Suganlal Mulachand Sethiya ..Respondent
(Orig.Plaintiff)

Mr.P.S.Dani for appellant
Mr.R.V.More for Respondent

CORAM :S.R.SATHE,J.
DATED:13th August 2004

ORAL JUDGMENT :-

1. Being aggrieved by the judgment and roder passe dby the Court of Additional District Judge, Sangli in Civil Appeal No.545 of 1986 whereby the order passed by the Court of 2nd Joint Civil Judge J.D.,Sangli in Civil Suit No.41 of 1983 dismissing the plaintiff's suit for specific performance was set aside and the appeal was allowed, the original defendants have preferred this appeal. For the sake of convenience hereinafter the parties shall be referred to as the plaintiff and defendants.

2. The brief facts giving rise to this appeal are as under :-

. Open land admeasuring 3060 sq.ft. out of plot no.13 situated at Sangli more particularly described in para 1 of the plaint was owned and possessed by original defendant. On 27-12-1975 original defendant no.1 executed an agreement to sell the said property in favour of plaintiff for amount of Rs.8,000/- and accepted earnest money of Rs.3,000/-. In the agreement to sell there was stipulation that if it is necessary to the plaintiff, the defendant would obtain consent of his heirs. It is plaintiff's case that though he was ready and willing to perform his part contract the defendant avoided to execute the sale deed on one or the other pretext. The plaintiff issued notice dated 27-12-1982 and called upon the defendant to execute the sale deed before the Sub Registrar. As per the said

notice he had also gone to the office of Sub Registrar but on that day the defendant did not turn up. Plaintiff, therefore, filed Regular Civil Suit No.741 of 1983 and prayed for specific performance of the agreement to sale.

3. The original defendants filed his written statement at Exh.12 and opposed the suit claim on several grounds. Firstly he contended that the suit property is not exclusively owned by him but his brothers and sisters are also having share in the same. They had never given consent to sell the said property and hence the agreement executed in favour of the plaintiff is not legal and correct. He also denied the plaintiff's allegation that the plaintiff was put in possession on the date of agreement to sell. The defendant further contended that other brothers are also necessary parties and suit is bad for non joinder of necessary parties. On these pleadings the learned trial Court framed issues. After considering the evidence adduced by both the parties, the learned trial Judge come to the conclusion that the plaintiff was all along ready and willing to perform his part of contract, however, the defendant was not ready and willing to perform his part of the contrary. The learned trial Judge however, held that defendant was only having 1/3rd share in the suit property and specific performance cannot be granted in view of the said fact. He therefore rejected the plaintiff's claim for specific performance

and passed decree only for return of earnest money with interest.

4. Being aggrieved by the said order the plaintiff preferred Civil Appeal No.545 of 1986. After hearing both the learned Advocate, the first Appellate Court came to the conclusion that plaintiff was all along ready and willing to perform his part of the contract and defendants had failed to prove that contract cannot be specifically enforced. He therefore set aside the order passed by the trial Court whereby the decree for specific performance was rejected and decreed the suit for specific performance by allowing the appeal.

5. Being aggrieved by the same the original defendants have preferred this second appeal.

6. At the time of admission in 1990 this Court has framed the following substantial questions of law, viz.

"The co sharers are according to plaintiff not willing to sell and the question of law is whether the specific performance which is a discretionary relief should have been decreed.

7. In this appeal before me, Mr.Dani, learned Advocate for the defendants, argued before me that co sharers of the property were not party to the agreement to sell and willing to execute the sale deed and as such the

order passed by the first Appellate court granting specific performance is not legal and correct. As against this, Shri More, learned Advocate for the plaintiffs submitted that there was abandon evidence on record to show that other brothers had in fact no share in the said property. Not only that but though they were aware about the suit agreement they never raised any objection about the said during last 25 years and as the order granted specific performance in favour of plaintiff is legal and correct.

8. From perusal of record and judgments of both the courts below it is quite clear that suit property was initially owned by defendant's father and after his death defendant and his brothers and sisters had share in the same. Though attempt was made on behalf of defendants to show that plaintiff was not actually put in possession of the suit property at the time of agreement to sell, it is very clear that after execution of the said agreement the plaintiff had moved the concern authority for entering his name in the record of rights on the basis of the agreement to sell and accordingly plaintiff's name was also entered in respect of the suit property. Not only that but the land in question was also got measured at the instance of plaintiff. Under such circumstances it is very difficult to believe that other co sharers in the suit property had no knowledge about the agreement in question or handing over possession of the property in

pursuance of the said agreement. From perusal of the first appellate Court's judgment it appears that according to him the defendant taking advantage of the fact that there are other co sharers in the suit property tried to avoid the execution of the agreement and under such circumstances the defendants should not have been permitted to do so. He therefore passed the decree for specific performance.

9. Mr.Dani, learned Advocate for Appellant defendant has placed reliance on a case Karta Singh V/s Harjinder Singh and ors. reported in AIR 1990 SC 854 wherein Their Lordships have observed that when the vendor's entering into an agreement for himself and on behalf of his sister and sister had refused to sell her share of property specific performance can be granted in respect of vendor's share. Relying on this the learned advocate for the defendant canvassed before me that in the instant case there are other co sharers and it seems that defendant who has executed an agreement to sale had in fact only 1/3rd share in the suit property and as such the first appellate court was not justified in decreeing the suit for specific performance. From the perusal of the above mentioned judgment it appears that in that case though there was other co-sharers having 50% share in the property, the Court did not refuse to pass decree for specific performance but specific performance was granted to the extent of only vendor's share. So on the basis of the said ruling it

can be argued that in the instant case also the specific performance can be granted to the extent of undivided share of the defendant in the suit property. However, in the instant case we find that other co sharers are not parties before this Court nor there is anything on record to show that his brothers have actually obstructed the plaintiff or at any time they had informed the plaintiff that they are having undivided share in the suit property. On the contrary it must be noted that plaintiff is put in possession of the suit property on the date of agreement to sell and not only that but after that the said land was measured and plaintiff put fencing around the said plot and he remained in actual possession of the same for a period of more than 28 years. During all these years the defendants have not taken any objection so this is a case where other alleged co sharers have not brought on record their specific disapproval or refusal to give consent to the agreement to sell. While in the case cited by the learned Advocate for the defendants there was specific refusal to give consent. There is another factor which distinguishes the facts of the present case from the facts of the above cited ruling. In the above cited case there was a specific averment that the vendor would execute agreement for himself as well as on behalf of his sister and it was also agreed that he would obtain the consent of his sister. In the instant case on the contrary the original defendant had in fact represented that property in question is owned by him.

It was not the case where he had said that the land owned by him and his brother and that they have authorised him to sell the said property or he is entering into transaction on their behalf. The stipulation that if it is deemed necessary the defendant would obtain consent of other co sharers only indicates that in case plaintiff insisted for same defendant would obtain their consent. Having regard to these distinguishing factors and bearing in mind that the suit for specific performance by the purchase, the vendor cannot put forth the defense that he had no title, we can say that in the isntant case there is no hurdle in directing the specific performance for agreement to sell as the same is otherwise enforceable in law. In fact such view has been taken in a case of Mir Abdul Hakeem Khan V/s Abdul Mannan Khadri reported in AIR 1972 A.P. 178 which is relied upon by the learned Advocate for the plaintiff. In that case it was observed by Their Lordships that where a suit for specific performance is filed only against the executant of an agreement to sell and there is no question of the plaintiff attempting to bind the interest of the persons not parties to the contract and making them parties, it is not necessary to go into the question whether the executant’s title is defective or whether the property belongs only to the partnership of which the executant is a partner. In the instant case, admittedly, the alleged co sharers are not parties to the present suit so whatever order that will be passed

in the instant suit will definitely not bind the other alleged co sharers. In other words,if other brothers of the defendants are having share in the suit property, their rights will not be affected by the present decree. So, if at all there are any other co sharers then it may happen that at the time of expectation of the decree they may raise objection but as it is, there is no hurdle in granting specific performance as observed by the first appellate Court. If the defendants have defective title but even then the agreement is properly enforceable then the plaintiff may chose to take property even with the defective title and thereby take risk.

10. Having regard to the peculiar facts and circumstances of this case and considering the position of law, it is not necessary to interfere with the order passed by the first appellate Court. In this view of the matter, there is no substance in the appeal.

. The appeal is dismissed with costs.

( S.R.SATHE,J.)